No.....

In the
Supreme Court of the United States

OCTOBER TERM, 1947

ANNE JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF
In Support of Petition for Writ of Certiorari

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OPINIONS BELOW

The judgment of the trial court was rendered on the 5th day of August, 1946 (R. 23).

The opinion and judgment of the Circuit Court of Appeals was rendered and filed on June 20, 1947 (R. 217, 218). The opinion of the Circuit Court will be found on page 218 of the Record.

The petition for Rehearing was denied by the Circuit Court of Appeals on August 15, 1947.

JURISDICTION

The date of the judgment to be reviewed is June 20, 1947 (R. 223) and the date of the Denial of the Petition for Rehearing is August 15, 1947 (R. 224).

The jurisdiction of this court is invoked under Section 240a of Judicial Code as amended (28 U.S.C.A., Sec. 347). See also the Rules of Practice and Pro-

cedure, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia (18 U.S.C.A. following Sec. 688).

STATEMENT OF THE CASE

A full statement of the case has been heretofore given in the Petition for Certiorari, and for the sake of brevity the statement is not repeated here.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the arrest of the petitioner was made under probable cause and that the search and seizure were reasonable and legal.

2. The Circuit Court of Appeals erred in holding that the closing argument of the U. S. Attorney "though disconnected, flamboyant and mainly accusatory of defendant's counsel asserting in his belief that counsel had concocted and made up the story of the defense," did not constitute reversible error because no objection was made thereto, no exception was noted and because the trial court stated that neither court nor counsel could do more to properly enable the jury to perform its duty; and further, because the "evidence in the case just about demonstrated appellant's guilt and it was hardly conceivable that the accusations by the Government counsel could have influenced the verdict in the slightest."

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Constitutional and other provisions involved are set forth in appendix pages 22-24, *infra*.

ARGUMENT

Summary of Argument

1. The decision of the Circuit Court was contrary to and in conflict with prior decisions of this court and with decisions of other Circuit Courts of Appeal on the same matter and lowers the standard of proof required for arrest and subsequent search and seizure in a private home. *Agnello v. U. S.*, 269 U.S. 20; *Byars v. U. S.*, 273 U.S. 28; *U. S. v. Lefkowitz*, 285 U.S. 452; *Harris v. U. S.* decided May 5, 1947; *Taylor v. U. S.*, 286 U.S. 1; *U. S. v. Lee* (C.C.A. 2) 83 F.(2d) 195; *U. S. v. Kaplan* (C.C.A. 2) F.(2d) 869; *Brown v. U. S.* (C.C.A. 3) 83 F.(2d) 383.

2. The decision of the Circuit Court of Appeals is in conflict with prior decisions of this court and with decisions of other Circuit Courts of Appeal on the same matter and resulted in the petitioner having an unfair trial. *Berger v. U. S.*, 295 U.S. 78; *Viereck v. U. S.*, 318 U.S. 237; *Weathers v. U. S.* (C.C.A. 5) 117 F.(2d) 585; *Pierce v. U. S.* (C.C.A. 6) 86 F.(2d) 949.

Point One

At the outset it must be said that, in view of the exhaustive review of the authorities on searches and seizures in *Harris v. U. S.*, *supra*, any further review seems hardly necessary. Yet, it should be borne in

mind in passing upon the arrest, search and seizure here, that the search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize a search of a house without a warrant. Protection under the Fourth Amendment to the Constitution extends to all equally, to those justly suspected or accused or as well as to the innocent. *Agnello v. U. S.*, 269 U.S. 20. Nor can a search prosecuted in violation of the constitution be made lawful by what it brings to light. *Byars v. U. S.*, 273 U.S. 28. Constitutional provisions for the security of persons and property are to be liberally construed and it is the duty of the courts to be watchful against any stealthy encroachment thereon, *Lefkowitz v. U. S.*, 285 U.S. 452. Nor may law enforcement officials enter premises ostensibly for the purpose of making an arrest but in realty for the purpose of conducting a general exploratory search for merely evidentiary materials intending to connect the accused with some crime. *Go-Bart Co. v. U. S.*, 282 U.S. 344.

The record here discloses that at least an hour before the Federal officers went to the hotel in which the petitioner lived, they had received a tip from an informer that unknown persons were smoking opium in the hotel. Without securing a warrant for any person and without securing a search warrant for the hotel for any room therein, the officers proceeded to enter and to go directly to the apartment of the petitioner, testifying that "their noses just lead right to the crack of that door" (R. 73).

The apartment was surrounded and all available means of escape closed. Even then, although there could be no possible change in circumstances while an officer went to obtain a warrant, no such procedure was followed. Instead, one of the officers knocked at the door and identified himself as being a law enforcement official. Up to that time, no one, not even the informer, had seen the petitioner and there had been no conduct on her part which might give anyone probable ground for believing that she was committing an offense.

After a slight delay, the door was opened by the petitioner and the officer informed her that she was under arrest because they were going to search her premises (R. 39). Certainly no citation of authority is needed to show that the hearsay statement of an informer could not be considered in determining the existence of probable cause, either for a search or an arrest. Therefore all that remained to the officers was a sense of smell; and this court has held that the presence of a distinctive odor alone does not strip the owner of a building of constitutional guarantee against unreasonable search. *Taylor v. U. S.*, 286 U.S. 1. A multitude of decisions in the various Circuit Courts of Appeals, as reviewed in *U. S. v. Kaplan*, 89 F.(2d) 869, have adopted and followed the rule so laid down. Yet despite those authorities, the Circuit Court of Appeals went so far as to hold that under some circumstances a smell of opium fumes was second only to the well known maxim that "seeing is believing" (R. 221); and, going still further, the

court impliedly recognized the validity of the informer's tip (R. 221).

The cases of *U. S. v. Kaplan*, 89 F.(2d) 869, and especially *Lee v. U. S.*, 83 F.(2d) 195 (the facts of which are practically identical to those in the instant case) hold that smell alone from either fermenting mash or burning opium is an insufficient showing of necessary probable cause to believe that a crime was being committed within. Therefore entrance into the premises and an arrest of the person charged were unlawful as being based on insufficient probable cause. Naturally the following search and seizure would be an unlawful one.

The trial court should under Rule 41(e) of the Federal Rules of Criminal Procedure (18 U.S.C.A. following Sec. 688) have suppressed the evidence upon the petitioner's motion. The matter was heard on affidavits and oral argument (R. 19).

The real purpose of the search was disclosed by Officer Belland while he was being cross examined by petitioner's counsel. During the cross examination, the United States Attorney requested permission to ask Officer Belland a question or two and thereafter the following ensued:

> "MR. POMEROY: In making this investigation, is it not true that an investigation was made on a large shipment of opium which was brought into this territory; you in conjunction with the Federal Narcotics Service?
>
> THE WITNESS: That is correct.
>
> MR. POMEROY: And this is a part of that examination, is that correct?

THE WITNESS: That is correct." (R. 66)

Obviously the officers expected to find a large quantity of opium in the Europe Hotel and entered the premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for evidentiary materials, intending to connect the accused with some crime. Such practice has been universally condemned. See *Go-Bart Co. v. U. S. supra; Lefkowitz v. U. S., supra; Henderson v. U. S.*, 12 F.(2d) 528.

Point Two

The United States Attorney's misconduct consisted primarily of (a) accusing the petitioner of committing perjury in several instances, and (b), accusing the petitioner's counsel of fabricating a story and thereafter suborning her to sign, swear and testify thereto. The first portion of his impeachment is grave enough; but the latter part, charging a fellow officer of the court with fabrication and subornation, without any evidence as a basis therefor, is altogether unjustifiable and inexcusable. Such accusations poison the wells, infuse into the imaginations of the hearers suspicion and mistrust of everything that might be said in reply, and so deprive one of the opportunity of making an effective defense.

The language of the *Berger* case is exactly in point here:

> "* * * It is as much his (United States Attorney)' duty to refrain from imporper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average

> jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. * * * Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

In *Weathers v. U. S.*, 117 F.(2d) 585, during the prosecuting attorney's argument, he said: "You gentlemen heard Mrs. Weathers testify. You heard that woman get on the witness stand here and deliberately perjure herself * * *." Counsel for the defendant objected and his objection was overruled. Thereupon the prosecutor continued, "Well, the jury can judge that for themselves. It was plain to be seen that the defendant or defendant's counsel, or somebody had gotten to this woman between the time she delivered the paper to us and the time she was called to testify."

In reversing the case because of prejudicial misconduct the circuit court declared:

> "The court did not reprimand the prosecutor for this line of argument nor direct the jury to disregard it. Moreover, he did not comment upon it in his charge. The full force of this argument was left with the jury. It carried the imputation and inference that the defendant

> and his counsel had been guilty of reprehensible conduct by influencing the witness to give false testimnoy. Furthermore, the jury might have concluded from his argument that counsel for the defendant had been guilty of conduct so reprehensible as to make the argument for the defendant unworthy of consideration and belief."

In still another way the prosecuting attorney unfairly tipped the scales of justice by introducing in argument unsworn testimony of his own. In his opening argument he testified, "Incense, she says she was burning and that was the strange odor, for the cats in the room. That is an old gag of narcotic addicts and has been for a long, long time, burning of incense * * *. But the officers testified before you, and I think that you will believe them, that the odor of opium is distinctive and one you will never forget once you have smelled it. The burning of incense is only to fool other people. Suppose someone, such as you or I, had gone into the Eurpe Hotel and smelled something funny in the halls. We are not experienced with narcotics and the natural explanation to us would be that it was some sort of incense. We would say to ourselves, 'Well that is rather odd smelling incense; I don't want that around my house.' But that is the old gag of a narcotic addict" (R. 170, 171).

The argument is particularly vicious in that the petitioner never testified that she was burning incense for the cats in her room, no one testified she was a narcotic addict and no witness testified that the burning of incense was an old gag of narcotic addicts to fool people. No defendant should be subjected to a trial on

the unsworn statements of an attorney conducting a prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred of the right of cross examination and also be debarred of offering evidence in rebuttal. *Taliaferro v. U. S.*, 47 F.(2d) 699; *Lowdon v. U. S.*, 149 Fed. 673, 676.

The opinion of the Circuit of Appeals indicated that the misconduct urged would not be reviewed because defense counsel had neither objected nor excepted. Apparently rule 52, Section (b) of the Rules of Criminal Procedure (18 U.S.C.A. following Sec. 688) which states "plain errors or defects affecting substantial rights may be noticed though they were not brought to the attention of the court," was overlooked. So was section 51 of the same rules which made the taking of exceptions unnecessary. But, as pointed out in *Sunderland v. U. S.*, 19 F.(2d) 202, the making of an objection under circumstances such as these would be an idle gesture because the court had already by an instruction approved of the United States Attorney's conduct in stating to the jury, "It is not known to the attorneys or the trial judge what more could be done to properly enable the jury to perform its duty" (R. 208).

We submit that the whole purpose of the argument was to persuade the jury that the petitioner and her counsel had been guilty of conduct so reprehensible as to make them unworthy of belief. Far from having no effect upon the jury, that it was intended to prejudice the jury it is sufficient ground to conclude that in fact it did so; and it was the duty of the court even if no objection was taken, to re-

prove counsel and to instruct the jury to disregard his statements.

Above all technical procedural rules is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place even though the Government itself be there a litigant. *Pierce v. U. S.*, 86 F.(2d) 949. *Atkinson v. U. S.*, 297 U.S. 157; *Read v. U. S.*, 42 F.(2d) 636.

Respectfully submitted,

JOHN F. GARVIN

APPENDIX

The Fourth Amendment to the Federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 26 U.S.C.A. Sec. 2553A provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by section 3221 and 3220 shall be *prima facie* evidence of liability to such special tax."

Title 21 U.S.C.A. 174 provides:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten

years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

Federal Rules of Criminal Procedure, Rule 41 (e) (18 U.S.C.A. following 688) provide:

"Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant."

Federal Rules of Criminal Procedure, Rule 51. (18 U.S.C.A. following 688). Provides:

"Exceptions Unnecessary.

"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

Federal Rules of Criminal Procedure, Rule 52(b) (18 U.S.C.A. following 688)—Provides:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."